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Thirty-third session

SUMMARY RECORD OF THE 679th MEETING

Held at Headquarters, New York,
on Tuesday, 13 June 2000, at 3 p.m.

Chairman: Mr. Jeffrey CHAN (Singapore)

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The meeting was called to order at 3.05 p.m.

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (continued) (A/CN.9/466, 470, 472 and Add.1-4; A/CN.9/XXXIII/CRP.4)

Article 6 (continued)

1. The CHAIRMAN said that serious concerns of policy had been expressed with regard to the definition, in draft article 6 (i) of the location of parties to the contract. The Commission also had before it a drafting amendment proposed by the representative of India, to replace the term "habitual residence" by "ordinary place of residence".

2. Mr. MORÁN BOVIO (Spain) objected to the proposal. No sufficiently weighty reasons had been given for departing from the standard term used in the present text.

3. The CHAIRMAN said that the text should therefore remain as it was. A further proposal, by the representative of France, was that location should be a function of a link with the contract of assignment rather than with the original contract.

4. Mr. SMITH (United States of America) was persuaded, by the comments of the representative of Canada, that there had to be one location for the assignor when there was more than one assignment. If there was one rule for determining location in the case of a particular assignment and a different rule for a second assignment, it was hard to see how the same priority rules could be said to apply.

5. The CHAIRMAN said that before tackling substantive issues the Commission had to decide whether to adopt a drafting proposal made by the observer for Factors Chain International, whereby the debtor's place of business, if in more than one location, would be defined as being in different States. He had also proposed that, if it was not clear which State had the closest link with the original contract, it should be the State from which the payment would emanate.

6. Mr. SALINGER (Observer for Factors Chain International (FCI)) explained that in the Working Group he had suggested a reference to the place to which the invoice would be addressed. However, the objection had been raised that in some cases there was no invoice. It was therefore better to designate the place from which payment would emanate according to the original contract.

7. Mr. BRINK (Observer for the European Federation of National Factoring Associations (EUROPAFACTORING)) supported the FCI proposal.

8. Mr. SALINGER (Observer for Factors Chain International (FCI)), explaining his first proposal, said that the location of the assignor would be defined in the following terms: "If the assignor has a place of business in more than one State, the place of business is the place where the central administration is exercised."

9. Mr. BERNER (Observer for the Association of the Bar of the City of New York) supported the proposed amendment, which would remove an element of ambiguity in the text.

10. The CHAIRMAN said that the question would be referred to the Drafting Group.

11. Mr. SALINGER (Observer for Factors Chain International (FCI)), commenting on his proposal concerning the location of the debtor, recalled the point made by the representative of Spain, that it was difficult to determine the location of a business for the purposes of the Convention where a contract took effect in a plurality of States, for instance where a debtor ordered goods for delivery in several States under the same contract. That was why he had proposed that the place of business should be that from which payment was to emanate.

12. Mr. SCHNEIDER (Germany) did not support the proposal. There were already problems of interpretation in determining the place most closely associated with the original contract. The proposal would tend to water down the existing definition and create further problems. He preferred to adhere to the policy adopted in the Working Group.

13. Mr. MORÁN BOVIO (Spain) favoured the proposal, which was intended merely to create a residual rule for cases in which it was impossible to determine which place of business had the closest relationship to the original contract or to the debtor.

14. Mr. DOYLE (Observer for Ireland) agreed with the representative of Germany that the term "closest relationship" was too vague and lent itself to a variety of interpretations.

15. The CHAIRMAN observed that the purpose of the FCI proposal was to provide a mechanism for identifying the applicable law in cases where the place of business could not be readily defined.

16. Mr. MORÁN BOVIO (Spain) said that in the light of the comments by the observer for Ireland and the representative of Germany he was willing to leave the text as it stood.

17. The CHAIRMAN invited the views of the Commission on the substantive issues raised by the representatives of France and Germany.

18. Mr. DUCAROIR (Observer for the European Banking Federation (EBF)) said that the Federation was intent on finding a satisfactory solution for defining the location of a branch in cases where the same receivable was assigned by establishments dependent on the same head office but located in different countries. The text of its amendment to draft article 6 (i) in document A/CN.9/472/Add.1, ("(iii) if the assignee has more than one place of business, the place of business is that which has the closest relationship to the assignment contract") should be followed by: "If the application of this rule designates more than one place of business of the assignor or assignee (located in different States), the relevant place of business is that place where its central administration is exercised." The purpose of that amendment was to

provide a suppletive rule for those very rare cases in which the general rule, of the branch with the closest link to the contract, would not suffice because the same receivable was being assigned by different branches.

19. Mr. SCHNEIDER (Germany) requested some clarification. Choosing the place of central administration of a bank would not solve the problem raised earlier by the representative of France.

20. The CHAIRMAN said a distinction had to be drawn between two separate issues: first, the question of defining in a consistent manner all the locations of the parties to a contract; and, second, how to deal with different branches of a bank involved in the same assignment. It had to be decided whether the existing text, which provided different definitions of the location of a debtor or assignor/assignee, should be maintained, or whether there should be a single definition covering the location of all parties.

21. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) explained that the reason why the Working Group had adopted an approach based on the place of central administration was to ensure not only that priority issues were referred to a single jurisdiction but also that the location would normally be the principal insolvency jurisdiction for the assignor. The different approach adopted towards the debtor was intended to ensure that the debtor protection system would function in a consistent and predictable manner.

22. Mr. MORÁN BOVIO (Spain) defended the existing text, which had been arrived at after lengthy discussion in the Working Group. Different criteria were applied because the aims pursued were different. It was not feasible to have a single rule applying to the location of the debtor, the assignor and the assignee, because the two latter might have nothing to do with the original contract, so the test of "closest relationship" could not be applied to them. However, the existing text did not entirely resolve the problem of branches, namely, those parts of credit or insurance entities which operated outside the normal location of the business.

23. Mr. SALINGER (Observer for Factors Chain International (FCI)) said that the proposed definition would affect factors. Factoring consisted of a considerable body of relatively small transactions. It was a straightforward matter to identify the assignor, but with a multiplicity of debtors it would be very difficult to decide where the central place of business of each was located. That was why he had opted for the place where the payment would originate. Leaving the definition as it stood at present would make it simpler for factors to provide services and credit.

24. Mr. SMITH (United States of America) welcomed the explanation by the Secretary of the Working Group regarding a different rule of location for assignors and assignees, as opposed to debtors. In most cases, the existing text would serve its purpose well. However, there was a problem in the case of banks, and perhaps insurance companies, having different branches. Banks routinely operated in foreign jurisdictions through branches, in order to take advantage of capital rules applying to enterprises, and were often governed by different regulations in each foreign jurisdiction. It might be desirable for

the Commission to consider having a separate rule of location for such branches, but without undermining the general rule formulated by the Working Group, which seemed to offer the best solution for receivables assigned by business entities other than banks.

25. Mr. DUCAROIR (Observer for the European Banking Federation (EBF)), after reading out his proposal a second time, said that while it had been drafted in an improvised manner and was therefore imperfect, it reflected a strong concern on his part that the current text of the Convention should be retained as drafted, leaving the question of conflicts of priority unresolved. Such conflicts might arise in cases where two branches of the same bank were assignors of the same receivable, although such cases were rare. He wished to establish a general rule that the place of business should be the branch having the closest relationship to the operation concerned. As a subsidiary point, in the extremely rare event that two branches were designated by the application of that rule, then the place of business should be the place where central administration was exercised.

26. The CHAIRMAN asked the previous speaker to elaborate on how the application of his first rule could lead to more than one place of business being designated, since the rule provided that the place of business was that which had the closest relationship to the original contract.

27. Mr. DUCAROIR (Observer for the European Banking Federation (EBF)) said that the following example would illustrate the point he wished to make. The French bank, Banque Nationale de Paris (BNP) had a branch in London and one in New York. On the assumption that the same receivable was assigned inadvertently by both the London and the New York branch, the application of the rule concerning closest relationship would designate either of those branches, which might create a conflict of priorities. It was therefore necessary to designate a single point of reference so as to permit implementation of the rule on priority laid down in the draft Convention.

28. Mr. MORÁN BOVIO (Spain) said that, rather than endeavouring to grapple with the entire issue raised by the representative of EBF, the Commission should focus on a very specific aspect of it, namely, the question of separate branches and offices of credit or financial institutions, as appropriate. In that connection, the proposal made by the Secretariat in paragraph 70 of document A/CN.9/470, that the Commission should take into account article 1 (3) of the UNCITRAL Model Law on International Credit Transfers, might resolve the issue under consideration. In accordance with the provision cited, branches and separate offices of a bank in different States were separate banks. The wording, which in his view would also cover insurance companies, constituted a good starting-point for the drafting of article 6 (i).

29. Mr. DESCHAMPS (Observer for Canada) said that, while regarding branches as separate legal entities might be an attractive solution at first glance, it raised more difficulties than it resolved. In the case of banks, conflicts of priority occurred most frequently in situations where a loan was inadvertently assigned twice. For example, the headquarters of a bank might assign a loan portfolio to the central bank of another country, and the portfolio might be administered by a place of business of the bank located in a country different

from the one in which the headquarters was located. The need therefore arose for a single rule in order to resolve conflicts of priority. To state that the headquarters and the branch should be regarded as separate legal entities did not solve the problem, because it was possible that the two assignments had been made by places of business which had not been involved in granting the loan and thus had no relationship to the original contract. Further provisions would then be necessary in order to clarify the question of which place of business was the owner of the receivable.

30. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) suggested that, in order to meet the concerns expressed by the representative of Spain and the observer for Canada, a subparagraph should be added to draft article 6 (i), reading: "If the assignor or the assignee has more than one place of business, the place of business is that place where its central administration is exercised. If the assignor or the assignee is a branch of a financial service provider or an insurance institution, the place of business is the place of that branch which has the closest relationship to the contract of assignment."

31. Mr. SMITH (United States of America) asked the Chairman to confirm his understanding that, while the existing text of draft article 6 (i) was generally acceptable to the Commission, there might be a need for a separate location rule for branches of banks and perhaps also insurance companies.

32. The CHAIRMAN said it was his understanding that the question before the Commission was as the United States representative had formulated it.

33. Mr. SMITH (United States of America) drew attention to suggestions made by his delegation in the Working Group which were very similar to what the Secretary of the Group had suggested (A/CN.9/466, para. 98).

34. Ms. McMILLAN (United Kingdom) suggested that the Commission should revert to the drafting suggestion made by the representative of EBF. Her delegation was satisfied with that suggestion, which addressed some concerns of EBF that were shared by the British Bankers Association and also dealt with the questions of multiple assignment and priority. Whether it solved the problems relating to branches of banks and to insurance companies was another matter.

35. Mr. SCHNEIDER (Germany) expressed appreciation to the representative of the United Kingdom for drawing attention to the EBF proposal. His delegation believed that the proposal would solve all the outstanding problems, including those relating to branches of banks and insurance companies. The basic rule that would be applied in all situations was that of the closest relationship to the original contract. In the case of conflicts of priority, the place of central administration would be decisive.

36. Mr. SALINGER (Observer for Factors Chain International (FCI)) said that any provision relating the location of the assignor to that of the original contract would destroy the whole benefit of the draft Convention to the factoring industry, which dealt with a large stream of contracts. There was no way for the factor to know whether a factoring agreement was or was not a factoring

agreement under the draft Convention. The proposal might be helpful to bankers, but it was very unhelpful to his industry.

37. Mr. DOYLE (Observer for Ireland), drawing attention to the report of the Working Group (A/CN.9/466), said that the Commission was revisiting a debate that had taken place at the Group's previous session. The question of whether there should be a separate rule for branches had been the subject of intense debate. A number of difficulties had been raised, including problems of definition, which might have been solved by the United States proposal. However, two more fundamental objections remained. One was that a separate rule for branches might undermine the basic rule of central administration. The other was that such a rule would constitute an injustice to third parties, since a third party could not be expected to know what the administrative structure of a bank or other organization was. In the light of those difficulties, he did not believe that the Commission was ready to adopt a separate rule for banks or branches.

38. Mr. MORÁN BOVIO (Spain) drew attention to the proposal made at an earlier session by the United States delegation in the Working Group (A/CN.9/466, paras. 98-99). It had suggested that if a special rule were to be used for branches and offices separate from a bank, the location should be defined as the place where the operation was recorded in the account books. There had been a great deal of opposition to that suggestion, because in an age of electronic accounting entries could be made anywhere, making it difficult to determine where the accounting was being done. Accordingly, another solution must be found. The proposal by the Secretariat helped to move the debate forward and was preferable to that of EBF.

39. Mr. STOUFFLET (France) said that his delegation, like that of Germany, supported the EBF proposal, with one reservation. The reference to the closest relationship to the original contract, which was valid when the debtor was involved, was not valid when the assignor was involved; in that case, what should be retained was a reference to the assignment contract.

40. Ms. WALSH (Observer for Canada) said that the first part of the EBF proposal was cast in general terms, so that all assignors and all assignees would be located in the State which had the closest connection with the original contract. It was her understanding that the representative of France would support that general rule. She recalled that when the Working Group had considered that possibility in the past, it had rejected it for the reasons identified by the observer for FCI, namely, the uncertainty and unpredictability it would create in the case of a bulk assignment of international receivables and in the case of an assignment of future receivables. In the first case, there might be a number of States whose laws would apply to different receivables within the same assignment, and, in the second case, it would not be possible to determine in advance the State with the closest connection to the original contract.

41. Mr. DUCAROIR (Observer for the European Banking Federation (EBF)) said that while the remarks made by the observer for Canada were very pertinent, they became less so if the French proposal was regarded as referring not to the original contract but to the assignment contract. He emphasized that his

proposal was intended to apply to all receivables; he was not seeking a special rule.

The meeting was suspended at 4.25 p.m. and resumed at 4.55 p.m.

42. Mr. SMITH (United States of America) said that his delegation was not happy to see the issue of location re-opened. Although not entirely satisfied with the text produced by the Working Group, his delegation could support it in a spirit of compromise. His delegation's original aim had been to achieve certainty, not only by locating the assignor in one State only, but by defining the assignor's location objectively as the place of jurisdiction in which an entity was legally organized or incorporated. After debate, his delegation had agreed to support the wording "place where central administration is exercised" as being far more certain than "closest relationship to the original contract". It would be a step backward to reject the Working Group's conclusions and to create a less certain and more fact-intensive location rule. The value of the draft Convention would be diminished and the flow of credit restricted in consequence.

43. Mr. MORÁN BOVIO (Spain) said that his delegation agreed with the United States position. Having circulated the draft in Spain, where it had met with a largely positive reaction, he was reluctant to re-open the issue. The only question that remained to be decided was whether a special rule should be devised for branches.

44. Mr. BRINK (Observer for the European Federation of National Factoring Associations (EUROPAFACTORING)) said that the Working Group had discussed at length all aspects of location, and all the arguments raised at the present meeting had been raised earlier. All the problems had been resolved except the question of branches, which had two aspects: scope of application of the draft Convention and questions of priority. Any solution adapted to one aspect tended to be imperfect from the standpoint of the other. The main need of business was for certainty. Exceptions ultimately led to litigation. His organization would opt for the text as it stood.

45. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that, with some trepidation, he would revive an old idea as a possible solution. With regard to scope of application, a desire for flexibility was evident, so that the draft Convention could have the widest possible application. On the question of priority, however, certainty was the primary concern. It was essential to avoid the result of multiple jurisdictions or conflicts with the UNCITRAL Model Law on Cross-Border Insolvency.

46. As a solution, the Commission might wish to reconsider the possibility of having a flexible rule of location for purposes of scope, while retaining the place-of-central-administration location rule for questions of priority. Without special treatment for branches, the acceptability of the draft Convention, especially to financial institutions, might be impaired.

47. Ms. McMILLAN (United Kingdom) said that the advantage of the approach suggested by the Secretary of the Working Group was that it would clearly indicate why location was defined differently for different purposes.

48. Mr. SCHNEIDER (Germany) said that his delegation had been in favour of the EBF proposal, but since it obviously had not met with consensus, a compromise position must be sought. The approach just suggested was one possible solution, although perhaps not the best. He would like to insist on one point, namely, that any rule that applied to branch offices of financial service providers should also apply to branches of companies in other industries. In Europe companies were increasingly doing cross-border business through branches.

49. The CHAIRMAN said that the discussion of a special rule for branches, of banks in particular, had taken a dramatic turn. Perhaps it was time to re-examine whether there was really a need for a special rule for branches, as suggested by the observer for Ireland. There appeared to be support for the notion that any rule formulated should apply generally and not be limited to branches of financial service providers.

50. Mr. BRINK (Observer for the European Federation of National Factoring Associations (EUROPAFACTORING)) said that the answer depended on the motive for a special rule. If the purpose was to expand the scope of application of the Convention to transactions emanating from branch offices, most participants would be in favour. However, with regard to questions of priority, care must be taken not to lose the certainty achieved by the present text.

51. Mr. MORÁN BOVIO (Spain) said that revisiting the reasons why a special rule was required for branches might help lead to a solution. If there were no such valid reasons, article 6 (i), which distilled the efforts of the Working Group, appeared to be acceptable to most. In no event, however, should there be separate rules for scope and for jurisdiction. That would be a step backwards. The Commission should limit itself to the narrow question of branches.

52. Mr. SMITH (United States of America) said that his delegation strongly supported the views of the representative of Spain. The Working Group had decided not to follow the approach earlier alluded to by the Secretary of the Working Group because of the importance of certainty not only as to priority but also as to application of the draft Convention. The search for flexibility would undermine certainty. If there were two different location rules for scope and priority, extenders of credit would have to undertake two investigations, one to determine whether the draft Convention applied and another to determine the applicable law. Two different rules might produce inconsistent effects. The Working Group had rejected the two-step approach primarily because of the practical difficulties involved in applying it, rather than for reasons of doctrinal purity.

53. If special rules were devised for bank branches, it would be for reasons of practical necessity. However, outside that specific area, his delegation would insist on preserving the location rule as set forth in article 6 (i).

54. Mr. WHITELEY (United Kingdom) said that his delegation agreed with the Secretariat that the issue was primarily one of enforceability of claims in insolvency. The problem was that different jurisdictions took different approaches to the insolvency of corporations and particularly banks. The approach taken in the United Kingdom was to allow all creditors to participate in proceedings. Some other jurisdictions preferred to favour the interests of

local creditors, particularly in the case of financial institutions, an approach which might be incompatible with a rule that applied a single location to the assignor based on place of central administration.

55. Mr. DOYLE (Observer for Ireland) said that the Commission should bear in mind its decision to have a single rule and that the text of article 6 (i) should therefore be retained. The only unsettled issue was whether there should be a separate rule for bank branches.

56. Ms. SABO (Observer for Canada) agreed with the representative of the United States that the reasons why the Working Group had chosen not to have separate location rules were valid and that settled issues should not be revisited.

57. Mr. IKEDA (Japan), concurring, said that the text as it stood was acceptable and workable. Special rules were generally not desirable, but in the case of branches one was needed.

58. Mr. DUCAROIR (Observer for the European Banking Federation (EBF)) said that a separate rule for bank branches would serve the purposes of central banks alone, which received assignments from other banks. It would not help commercial banks at the front line of operations, which generally received assignments not from banks but from industrial firms and the like. Hence his Federation's proposals had sought to reconcile the views of those who favoured the place-of-central-administration location rule and those who favoured the place-of-business-with-the-closest-connection rule.

59. Mr. MORÁN BOVIO (Spain) reiterated that the general rule was acceptable and said that the only question still before the Commission was whether a special rule for bank branches was needed and what was meant by the term "branch".

60. Mr. DESCHAMPS (Observer for Canada) said that the issue was narrow in scope if the focus was solely on branches. The problem of locating the assignor arose only if the assignor had more than one place of business, namely, an office or branch.

61. The CHAIRMAN observed that the discussion had not yielded sufficient support for either the EBF proposal or the proposal based on the UNCITRAL Model Law on Cross-Border Insolvency or the proposal by the Secretary of the Working Group for two separate rules. The consensus therefore seemed to be that article 6 (i) should be left as it stood, except for the question of branches, which must encompass branches of every type, not simply those of financial institutions. There seemed, however, to be a feeling that there was no need to address the question of branches for inclusion in the draft Convention.

62. Mr. SMITH (United States of America) endorsed the comments of the observer for Canada. There was agreement among delegations when only one place of business was involved and disagreement when there was more than one: that was the crux of the matter. Yet, to have a different rule for branches was to have a different location rule and would mean that the whole issue was being reopened. Only a text for some sub-category of branches, such as those of banks or insurance companies, would not necessitate a reopening of the issue.

63. Mr. DESCHAMPS (Observer for Canada) concurred. The current location rule did not deal with branches in more than one State.

64. The CHAIRMAN said that since the Working Group had already provided a text on branches in general, the question was settled, and there was no need for further discussion.

65. He invited the United States delegation to introduce the proposals submitted in document A/CN.9/XXXIII/CRP.4, which were intended for inclusion in articles 6 and 4.

66. Mr. SMITH (United States of America) said that, as indicated by the observer for Canada the previous day, receivables fell into three categories: one to which all the rules of the Convention applied in their entirety; a second to which many of those rules applied, although a few needed to be adjusted to take account of market practices and expectations; and a third where the Convention had little impact and might cause some harm, and where those who participated in the assignment of those receivables were highly sophisticated, working under rules devised for themselves and other participants.

67. Paragraph (x) (i) of the United States proposal listed the receivables which the Commission definitely wanted the draft Convention to cover: it would be noted that subparagraph (i) (A), reflecting the language of article 6 (1) of the current draft, included the right to payment for goods sold or leased or for the provision of services other than financial services, but did not include real-estate receivables, for which the Convention rules might not be suitable because the Convention's choice-of-law rule was at variance with the rule chosen for such receivables in many countries and was likely to meet with resistance. He recalled that at the beginning of the session the Under-Secretary-General for Legal Affairs had said that real estate was a common form of collateral and that the draft Convention was designed primarily to permit the extension of credit in situations where real-estate collateral was not available, especially to the less wealthy.

68. The draft Convention should also cover the sale or licensing of trademarks, patents, copyrights, trade secrets and other intellectual property, as indicated in subparagraph (i) (B). World economies were shifting from goods-based economies to information-based economies and the type of receivable involved was a key receivable of the modern age. Credit card transactions (subparagraph (i) (C)); loans (subparagraph (i) (D)); and various financial accommodations that resembled loans (subparagraph (i) (E)) should also come under the draft Convention.

69. Paragraph (x) (ii) of the United States proposal listed receivables that were excluded from the draft Convention, some of which might otherwise fall into the categories given in paragraph (x) (i). For instance, rights to payment for the sale of goods regularly traded on commodities exchanges in a regulated financial market that did not need the Convention because assignments were made through commodity brokers following their own entirely different rules (ii) (A) were excluded. Similarly excluded were receivables arising from the sale, lease or loan of gold or other precious metals (ii) (B), which were viewed as currency by the metal-lending industry, in the sense of the obligation to repay, and were

traded in regulated markets and off-markets through standard forms and master agreements among sophisticated parties. Another exclusion applied to receivables resulting from netting agreements (ii) (C), which had also troubled the European Banking Federation, for the sophisticated parties involved did not need the Convention. Receivables resulting from bank-deposit relationships and inter-bank payment systems (ii) (D) or from insurance or reinsurance contracts (ii) (E) were also excluded. He would discuss the remaining exclusions, including (ii) (F) about which his delegation felt the least strongly, at the following meeting.

70. His delegation's proposed amendment to draft article 4 dealt with exclusions in relation to loan receivables involving anti-assignment clauses that were applied in the loan syndication and participation market, which would be harmed by the provisions of articles 11 and 12 of the draft Convention.

The meeting rose at 6 p.m.